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ALEXANDER L. STEVAS,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-____

CHARLES L. PLATER,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF CLAIMS

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QUESTIONS PRESENTED FOR REVIEW

The question presented for review is whether a civil service employee who is removed from his position is entitled to judicial review when his removal is effected in violation of governing agency regulations?

PARTIES BELOW

The only parties to this proceeding in the court below are those indicated by the caption of this petition.

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No. 82-____

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

OPINIONS BELOW

The order of the Court of Claims dated April 27, 1982, (Appendix, hereinafter, App 1-5) dismissing petitioner's case has not been reported. The administrative decisions of the

Civil Service Commission Federal Employee Appeals Authority and the Merit Systems Protection Board Office of Appeals Review which were the subject under review in the Court of Claims also are not reported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1255(1).

STATUTES AND REGULATIONS

There are set out in the appendix to this petition the following provisions:

Department of the Navy Regulations

NAVORDSTAINST 12000.2A CH-20,

2 April 1976

OCMMINST 12000.1 CH-12? Dec 75

STATEMENT OF THE CASE

Petitioner, Charles Plater, is a 55 year old former GS-5 security guard at the Naval Ordnance Station, Indian

Head, Maryland who began his federal civil service following an honorable discharge from the military on August 22, 1954. Petitioner was involuntarily removed from his position on January 15, 1977, for the alleged attempt to steal Five Dollars ($5.00) worth of government gasoline on the night of December 2, 1977. At issue is the decision of the Court of Claims dismissing the petition in the Court of Claims seeking review of the determination that he would be removed from the federal service and the determination of the Federal Employees Appeals Authority and Merit Systems Protection Board upholding petitioner's removal.

By letter dated 12 December 1977 NAVORDSTA advised petitioner, Charles L. Plater, of his proposed removal from the federal service for attempted theft of government property. By letter dated January 11, 1978, petitioner was advised that his removal would be effective on January 15, 1978.

Petitioner filed a timely appeal of the decision to remove him to the Federal Employee Appeals Authority (FEAA) of the United States Civil Service Commission by letter dated January 19, 1978. In this letter petitioner contended that NAVORDSTA violated its own regulations, that he was innocent, and maintained that his removal was arbitrary and capricious in that other like cases did not result in the imposition of the harsh penalty of

removal. In a decision dated 17 July 1978, the FEAA affirmed the agency's decision to remove the petitioner from Federal Service. By letter dated August 18, 1978, petitioner requested that the Appeals Review Board, United States Civil Service Commission, reopen and reconsider his case. This request contended that the evidence failed to establish that petitioner actually attempted theft of government property, and that violations of established policies occurred rendering the decision arbitrary and capricious. By letter dated June 22, 1979, petitioner was advised that, in accordance with his request, the Merit Systems Protection Board reviewed the administrative record and found that his request did not meet the regulatory

criteria of Sections 772.310 and 772.312 of Title 5, Code of Federal Regulations and therefore his request to reopen the FEAA decision was denied.

On March 2, 1981, petitioner filed suit in the Court of Claims seeking restoration to his civil service employment, expungement of documents relating to his removal, or in the alternative return to the Merit Systems Protection Board to redetermine a lesser penalty.

On September 1, 1981, petitioner moved the Court of Claims for summary judgment in his favor alleging that the adminstrative decisions were not supported by substantial evidence and that the penalty of removal was an abuse of discretion in that it did not promote the efficiency of the federal

service because (a) the agency had failed to abide by its own regulation which required petitioner's supervisor to personally investigate charges against him prior to proposing removal; (b) the agency had failed to abide by its own regulation which required that certain factors be considered before an employee was subjected to removal; and (c) higher level employees had received only minimal punishment for offenses which were more serious.

On November 24, 1981, the United States opposed petitioner's motion for summary judgment and filed a cross-motion for summary judgment contending that the FEAA decision was entitled to finality because (a) the Court of Claims was limited in its scope of review; (b) there had been

compliance with the applicable regulations and that any deviation from the regulation was harmless; (c) the agency action was supported by substantial evidence; and (d) removal was a proper penalty.

On April 27, 1982, the Court of Claims granted defendant's cross-motion for summary judgment and dismissed the petition there, finding that due to its limited scope of review there was no basis to set aside the determination of the FEAA. The Court of Claims did not address petitioner's contention that the government had not complied with the applicable regulations.

REASONS FOR GRANTING THE WRIT

THE COURT OF CLAIMS DECISION IS IMPORTANT AND IN CONFLICT WITH ITS OWN PRIOR RULINGS, RULINGS OF THE COURT AND RULINGS OF THE CIRCUIT COURT

Although the scope of judicial review for administative determinations concerning the removal of civil service employees is extremely limited, the Court of Claims has the authority to reverse agency action which is arbitrary and capricious. Power v. United States, 209 Ct. Cl. 126 (1976); Boyce v. United States, 543 F.2d 1290 (Ct. Cl. 1976); Jacobowitz v. United States, 191 Ct. Cl. 44, 424 F.2d 555 (1970); Daub v. United States, 154 Ct. Cl. 434, 295 F.2d 895 (1961).

The scope of review also permits judicial review and reversal of agency action which is violative of its own

regulation. Service v. Dulles, 354 U.S. 363 (1957); Vitarelli v. Seaton, 359 U.S. 585 (1959); Harris v. United States, 661 F.2d 885 (Ct. Cl. 1981), Brewer v. United States Postal Service, 227 Ct. Cl. , 647 F.2d 1093, 1097 (1981); or which are not supported by substantial evidence; Reil v. United States, 197 Ct. Cl. 542, 456 F.2d 777 (1972); Power v. United States, supra; Young v. Hampton, 658 F.2d 1253 (7th Cir. 1973). Judicial review where an agency has not complied with its own regulations does not involve the Court's substituting its judgment for that of the agency. Instead the Court is requiring the agency to act in consonance with its own regulations. The record before the Court of Claims revealed that the agency removed

petitioner from his employment in contravention of its own regulation. The Court of Claims' failure to address or reconcile this fact effectively, denied the petitioner the judicial means of holding the agency to its regulations and potentially denies that right to any other civil service employee. Therefore, the Court of Claims decision is important and conflicts with prior rulings.

At the time of petitioner's removal from his position, the governing regulation was NAVORDINST 12000.2A 4(a)(4) CH-20, April 2, 1976. This regulation provided that prior to proposing an employee's removal from his position

> "...the supervisor must conduct a thorough investigation to determine whether an offense has been committed and whether some type of disciplinary action is warranted. Interviews should be conducted individually and privately with the employee concerned, other employees or supervisors involved, and any witness. If appropriate, written statements should be obtained and notes taken for use in preparing any formal action which may result. During investigations, employees should be given an opportunity to explain their position and any mitigating circumstances." (Emphasis added).

By requiring the supervisor to "conduct a thorough investigation" complete with an individually and privately conducted interview, the agency grants a right to employees to "be given an opportunity to explain their position and any mitigating circumstances." It was not disputed that nothing in the record before the Court of Claims indicated

that petitioner's supervisor conducted such an investigation or that petitioner was accorded a private individual interview with his supervisor or "opportunity to explain [his] position and any mitigating circumstances" prior to the initiation of disciplinary action by the agency. Accordingly, there was no question that the agency failed to follow its own regulation. The Court of Claims' failure to address this contention therefore denied the petitioner of the means to hold the agency to its regulation.

The agency also failed to abide by the provisions of Paragraph 2, Part III, Chapter II, NAVORDSTAINST 12000.2A which provides:

> "Disciplinary action should be corrective, not punitive, and should be initiated promptly, normally within 15 days after occurrence of the event for which action is being taken. The employee should be told what he did wrong, why it was wrong, and what he should do in the future. The penalty imposed should be the minimum reasonably expected to correct the offending employee and to maintain general discipline and morale in the organization."

This regulation permitted the agency to determine "the minimum [punishment] reasonably expected to correct the offending employee." However, in order to satisfy the requirements of 5 U.S.C. §7512 that the adverse action promote the efficiency of the federal service, this determination cannot be made in a vacuum. To do so is the epitomy of an arbitrary and capricious decision. Another regulation, Paragraph 2-2, OCMMINST 12000.1 provided specific

considerations applicable to allegations of theft. OCMMINST 12000.1 provides:

> "Actual or attempted theft of government property or the property of others. This offense is of such serious nature that removal, under certain circumstances, may be justified; for instance, when there is evidence that there has been collusion, the theft is premeditated, or is not an isolated instance of poor judgment on the part of the employee who has an otherwise unblemished record. The book value, replacement cost or resale value of the items, whether or not restitution is made, etc., ordinarily will not be considered. Employees must be kept informed through supervisory channels, bulletin boards, house organs, etc., that the Department of the Navy will not tolerate theft, and that offenders can expect grave consequences."

The record before the Court of Claims showed that petitioner was a GS-5 nonsupervisory employee with

twenty-four years of completely satisfactory service, with an unblemished record, who was removed for the first offense of the alleged theft, while acting alone, of $5.00 worth of government gasoline. The record before the Court of Claims also showed that in an earlier case, the agency had imposed a one-day suspension on a GS-8 foreman, responsible for property accountability and having the authority to requisition equipment, for the colluded and premeditated theft of $162.85 worth of tools. Since the "minimum [punishment] reasonably expected to correct the offending employee" in the supervisor's case was a one-day suspension, there was no rational basis for imposing the extreme penalty of removal of petitioner. The only rationalization

for the apparent disparate treatment of petitioner proffered by the agency was that petitioner was a GS-5 Guard. However, in view of the express language of OCMMINST 12000.1 and the fact that the GS-8 supervisor was responsible for property accountability and had the authority to requisition equipment, there is no basis for determining that petitioner should have been subjected to an infinitely higher sanction. Had petitioner been suspended for six (6) months or 180 days, his punishment would have been 180 times that given the GS-8 supervisor. Since one (1) day was the "minimum [punishment] reasonably expected to correct" the supervisor, there is no basis for determining removal was necessary for petitioner.

Thus, the agency has violated both OCMMINST 12000.1 and NAVORDSTAINST 12000.2A.

The prejudice to petitioner due to the failure to abide by the provision of OCMMINST 12000.1 that "the penalty imposed should be the minimum reasonably expected to correct the offending employee and to maintain general discipline and morale in the organization" is manifest--had the agency complied there would have been no removal. Thus, the departure from the regulation is clearly not harmless error.

The prejudice to the petitioner resulting from the failure to abide by the provision of NAVODSTAINST 12000.2A(a)(4) is equally clear. Had the agency complied with the regulation

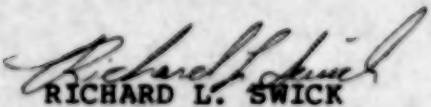
petitioner's supervisor would have personally investigated the charges against petitioner and personally conducted an interview with petitioner. In such an interview, the petitioner would have been able to present his defense and to point out that the gasoline value was only $5.00 and that he had an unblemished record. Petitioner also would have been able to point out the fact that a GS-8 supervisor, who had responsibility for the accountability of property and the authority to requisition equipment and who had colluded with another employee to steal $162.85 worth of tools had received only a one-day suspension. This certainly was a substantial right.

Had the agency complied with this regulation and had petitioner been accorded this opportunity prior to the initiation of disciplinary action, petitioner's removal could well have been avoided. Accordingly, the agency's failure to abide by its own regulations arbitrarily denied petitioner a right conferred by its regulations. The Court of Claims failed to address or reconcile this fact. This was a clear error which potentially deprives a civil service employee of the means of enforcing substantial rights conferred by agency regulations.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX A

ORDER, UNITED STATES COURT OF CLAIMS

Charles L. PLATER v. THE UNITED STATES,
Ct. Cl. No. 117-81c, April 27, 1982.

IN THE UNITED STATES COURT OF CLAIMS

No. 117-81C

CHARLES L. PLATER	)	Civilian pay;
	)	removal of
v.	)	security guard
	)	for attempted
THE UNITED STATES	)	theft of
	)	government
	)	property;
	)	decision of
	)	Federal Appeals
	)	Authority
	)	sustaining
	)	removal upheld.

April 27, 1982

Richard L. Swick, attorney of record, for plaintiff.

Gerald L. Elston, with whom was Assistant Attorney General J. Paul McGrath, for defendant. Catherine M. Holzle, Department of Navy, of counsel.

Before FRIEDMAN, Chief Judge, KASHIWA, Judge, and MARKEY, Chief Judge of the United States Court of Customs and Patent Appeals.*

*Sitting by designation pursuant to 28 U.S.C. § 293(a) (1976).

FRIEDMAN, Chief Judge:

The plaintiff, formerly a security guard at a government installation, challenges the decision of the Federal Employee Appeals Authority ("Appeals Authority") of the Civil Service Commission that sustained his removal from his position for attempted theft of government property. Both parties have moved for summary judgment, and we heard oral argument. We uphold the Appeals Authority and dismiss the petition.

The facts are set forth in the decision of the Appeals Authority and need not be repeated at length. In brief, they are that the plaintiff filled two 5-gallon cans with gasoline from a pump at a government fuel station and was apprehended when he attempted to leave the installation in

an automobile containing the cans of gasoline. Theft of gasoline was a problem at the installation, and an additive had been placed in the government gasoline tanks to enable the government to identify its own fuel. When the government tested the gasoline in the two cans that the plaintiff attempted to remove from the installation, the tests identified it as government gasoline.

Before this court, the plaintiff contends that the agency did not comply with its procedures, that the agency's finding that the plaintiff attempted to steal government gasoline is not supported by substantial evidence, and that removal was an excessive penalty for the offense.

In a civilian pay case the scope of our review is limited to determining whether the procedural requirements have been met, whether the findings are supported by substantial evidence, and whether the challenged personnel action is arbitrary or capricious. Boyle v. United States, 207 Ct. Cl. 27, 34, 515 F.2d 1397, 1401 (1975). "It is not our function to substitute our judgment for that of the employing agency or the Civil Service Commission; rather, we review the case to determine whether their action was reasonable in light of all the evidence." Id. 515 F.2d at 1401. Under these standards we have no ground to set aside the determination of the Appeals Authority, the opinion of which adequately discusses and determines the issues in this case. On the basis of that decision, we uphold

the removal of the plaintiff from his position.

The defendant's motion for summary judgment is granted, the plaintiff's motion for summary judgment is denied, and the petition is dismissed.

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SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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APPENDIX B

DECISION OF UNITED STATES
CIVIL SERVICE COMMISSION
FEDERAL EMPLOYEE APPEALS AUTHORITY
Washington, D. C. Field Office

APPEAL OF CHARLES L. PLATER

Decision Number DC 752B80296

Decided on July 27, 1978

UNITED STATES CIVIL SERVICE COMMISSION
FEDERAL EMPLOYEE APPEALS AUTHORITY
WASHINGTON, D.C. FIELD OFFICE
WASHINGTON, D.C. 20415

APPEAL OF CHARLES L. PLATER
UNDER PART 752, SUBPART B, OF THE
CIVIL SERVICE REGULATIONS

Decision Number: DC752B80296

Decided On: July 27, 1978

INTRODUCTION

By letter dated January 19, 1978, Mr. Charles L. Plater appealed from the decision of the Department of the Navy, Naval Ordnance Station, Indian Head, Maryland, removing him from the position of Guard, GS-5, effective January 15, 1978.

BASIS FOR ACCEPTANCE

Appellant is an employee who has completed a probationary period in the competitive service. Accordingly, we find his appeal acceptable for adjudication under part 752, subpart B

of the Civil Service regulations. We further find that his appeal was timely filed.

ANALYSIS AND FINDINGS
A. PROCEDURES

Section 752.202 of the Civil Service regulations provides that an employee against whom an adverse action is sought is entitled to a minimum of 30 days advance written notice setting forth, specifically and in detail, the reasons for the proposed action. The agency must inform the employee of the right to review the material relied on in proposing the action and of the right to reply personally and in writing to the proposed action. The employee is entitled to a reasonable time in which to exercise the right of reply. Any response by the employee must be considered by the agency in reaching its final decision. The

decision, itself, must be made by an official at a higher organizational level than the official who proposed the action and must identify the reasons in the proposal notice that have been found sustained.

By letter dated December 12, 1977, from the Administrative Services Officer, appellant was informed that his removal was proposed for attempted theft of government property, as follows:

1.a. On 2 December 1977 at about 2200, you were observed refueling the Stump Neck Annex security patrol vehicle (1/2 ton pickup) from pump number 2 (key 3) located at the fuels station at Stump Neck Annex. Upon completion of fueling the vehicle, you were observed extending the gas hose into the bed (back) of the pickup truck

and pumping gasoline into some receptacle other than the truck filler neck located on the exterior wall of the truck (enclosure (1) to enclosure (1)).

b. Upon completion of refueling, you proceeded to the parking area adjacent to Building 2008, Stump Neck Annex and parked in close proximity behind a privately owned vehicle registered to a Mr. Jerome Plater. You appeared to remove something heavy from the bed of the pickup and deposit the objects in the trunk of the privately owned vehicle (enclosure (2) of enclosure (1)).

c. You then proceeded to the main gate in the security truck to allow the entry of oncoming guards. At this time, you were approached by PHC John E. PENNER, USN, who advised you not to

leave but to remain with the vehicle until the arrival of the NAVEODFAC Security Officer (EMSC Marvin BRANNIN).

d. At approximately 2310, 2 December 1977, DET/LT Francis V. Ruble of the Security Division, NAVORDSTA arrived and requested that the gas cap of your privately owned vehicle be removed and the trunk of this privately owned vehicle be opened in order to make chemical analysis of gas tank as well as gasoline in two 5-gallon cans found in the trunk of the automobile. You were informed that the reason for the search was based on the fact that you were observed pumping gasoline into something other than the patrol vehicle and were suspected of having in your possession gasoline belonging to the U.S. Government. The search was made in accordance with Section 21, 50 USC

797. You did comply with these instructions.

e. An on-the-spot chemical analysis was made by DET/LT Ruble in the presence of EMCS Marvin BRANNIN, PHC J.E. PENNER and Security Guards D. Hall, R. Grabis, O. Vanscoy and yourself. The chemical analysis of the gasoline in Mr. Jerome Plater's automobile gas tank proved negative. The chemical analysis of the gasoline contained in both 5-gallon containers in the trunk of the automobile proved positive. A positive reading indicated that the gasoline had to have been pumped from Government gasoline tanks on either the Stump Neck Annex or Naval Ordnance Station gasoline pumps and was Federally owned property.

f. You observed and were advised of the results of the chemical analysis by DET/LT Ruble and when confronted with the results of the chemical analysis you were advised that the gasoline in the cans was government property and asked to relinquish custody of the cans to DET/LT Ruble. You refused to do so and insisted that the gasoline belonged to you.

g. The Naval Ordnance Station Security Officer, Mr. R.G. Sprague, was apprised of the situation and the decision was made not to confiscate the two 5-gallon cans at that time but to note that the cans and their contents remained in your possession.

h. You were advised by DET/LT Ruble prior to your departure to report for ensuing regularly scheduled duty at the Naval Ordnance Station. This was

done at the direction of the Naval Ordnance Station Security Officer.

2. A special chemical additive (formulated by a NAVORDSTA chemist) had been placed in the tanks at the gasoline pumping station at Stump Neck Annex on 8 November 1977 by DET/LT Ruble at the request of the NAVORDSTA Security Officer, in view of discrepancies in accounting that indicated wrongful appropriation was being effected. This chemical, when treated with an additional solution (enclosure (2)) causes the solution to separate and change color which is an indicator that the tested gasoline came from gasoline tanks located at either Stump Neck Annex or Naval Ordnance Station. No other gasoline tanks could contain this specially prepared formula, since it was prepared exclusively for this Station.

3. Your responsibilities as a law enforcement officer include special provisions of trust involving the protection of personnel and property assigned to the Naval Ordnance Station and the Naval Explosive Ordnance Disposal Facility, Indian Head, Maryland, as scheduled.

4. Based on the reasons indicated above, it is proposed that you be removed from the rolls of the Naval Ordnance Station and the Federal Service for attempted theft of government property. This proposal is made to promote the efficiency of the service.

We find that the reasons for the proposed action was set forth with sufficient specificity and detail to permit an opportunity for reply.

Appellant was informed that he could review the material relied on to support the proposal and further, that he could reply to the charges in person and/or in writing within ten calendar days of his receipt of the proposal notice. Appellant did not reply.

Appellant contends that he was informed on December 31, 1977, by his supervisor that the time for his reply had been extended due to the fact that the Naval Ordnance Station (NOS) was shut down for the Christmas holidays. Appellant further states that he was not informed of how long an extension had thereby been granted.

The record reflects that, according to the terms of the proposal notice, appellant could have submitted a written request for an extension of the time in which to submit is reply.

Nothing in the record reflects that he did so. Whether or not an oral extension was granted by appellant's supervisor, the fact remains that, while Civil Service regulations require that a "reasonable" amount of time be granted, the decision letter in the instant case was not issued until a full 30 days after the proposed notice. During that entire time appellant submitted no reply. In view of the above, we are not persuaded by appellant's contention that he was somehow lulled into thinking that he had "plenty time to ask for extension."

By letter dated January 11, 1978, from the Executive Officer, appellant was informed that the reason as set forth in the proposal notice was found sustained, warranting his removal, effective January 15, 1978.

Appellant alleges that he was given only 29 days advance notice of the instant removal action, instead of the 30 days required by the regulation. It would appear that appellant is calculating from the date he received the proposal notice (December 13, 1977) until the date of the decision letter (January 11, 1978). However the 30-day requirement is satisfied when 30 full calendar days elapse between the date the employee is first made aware of the proposed adverse action and the date it is effective. In this case, 33 days passed between December 13, 1977 (date of receipt of proposal) and January 15, 1978 (effective date of action). Accordingly, we find the regulation to be satisfied, and appellant's contention to be incorrect.

Lastly, citing NAVORDSTA Inst. 12000.2A 5(a)(4), Investigate Violations, appellant contends that the agency violated its internal regulations by not having conducted a "thorough investigation" of the incident. Having found above that appellant was afforded a reasonable opportunity to respond to the charges, and that he failed to do so, we further find that the agency, in accordance with the guidelines set forth in the cited regulations, did, in fact, conduct such investigation as was required, prior to instituting adverse action.

Based on our review of the record, we find that the agency complied with all of the procedural requirements of the Civil Service regulations, as well as the cited agency regulation, in effecting the action.

B. MERITS

As appellant had initially requested a hearing in his letter of appeal, a hearing notice was mailed to his representative and to the agency on May 17, 1978, scheduling the hearing for June 15, 1978. Neither the appellant nor his representative appeared at the hearing. Appellant's representative stated, when phoned, that, in fact, a hearing was not desired. The agency then requested that it be allowed to supplement the record by submitting additional documentation. These documents were accepted. By letter dated June 20, 1978, a copy of this information was forwarded to appellant's representative, along with a copy of the agency's response to the Appeals Officer's request for certain

statistical information. Appellant's representative was afforded ten calendar days in which to comment on these materials. Through this representative, comments were received on July 6, 1978. They have been given due consideration in the adjudication of this appeal.

In support of the charges, the record contains signed statements from Detective Lieutenant Francis V. Ruble, Marvin J. Brannin, Security Officer, PHC J. E. Penner, and SCPO Leonard J. Thompson. All were prepared at or shortly after the incident in question. Specifically, they relate that on December 2, 1977, at approximately 9:00 p.m., appellant was observed at a government fuel station. Having first filled the tank of his patrol vehicle, he was then seen placing the gas nozzle

into the bed of the vehicle. Minutes later, he was observed removing something from the security truck and placing it into the trunk of a white automobile. When confronted, appellant was requested to open the trunk of his car. He did so, revealing two 5-gallon cans of gasoline.

The file also contains a memorandum from Vincent M. Disandro, dated December 7, 1977, which states the following: that in March of 1974, the Naval Ordnance Station at Indian Head, Maryland, initiated a program of "taggng" the gasoline it purchased in order to identify unauthorized use. The gasoline is treated with a mixture of phenolphthalein and methanol, in an exact ratio, such that when a sample thereof is added to a solution of sodium carbonate, a pink color chemical

produced by the reaction of phenol with phthalic anyhdride. Therefore, the chance of phenolpthalein being present in ordinary gasoline is highly remote.

In the instant case, gasoline samples taken from appellant's car reacted negatively, while samples taken from the 5-gallon cans reacted positively when so treated.

Appellant contends that he purchased one of the NOS trucks at an auction, at which time it was nearly full with "government gasoline." He later noticed that the top to the gas tank was off. For safety reasons, he decided to drain the gas - first into one 5-gallon can, then into his car, and then into the second 5-gallon can. When confronted, he "submitted to the search as requested because I had done no wrong and there was nothing to fear."

The gasoline taken from appellant's car showed no reaction, but the gasoline taken from the can, despite appellant's contention that all the gas was the same, was allegedly tampered with by Lt. Ruble, out of sight, producing the reddish shade.

On examination of appellant's contentions, we find that his bare allegations that he had purchased the truck in question at an auction, and that the gasoline, which he said was rightfully his, was tampered with by Lt. Ruble, are totally unsupported by any evidence in the record. On the other hand, the statements of agency personnel, previously referred to, all relate that appellant filled the 5-gallon cans with government gasoline from the government pump, and proceeded to place the filled cans in his private automobile.

Therefore, based on the evidence of record, we find the charge of attempted theft of government property to be supported and, accordingly, sustained.

Appellant alleges, however, that there have been other cases of attempted theft at NOS for which the penalty was less severe than removal. The agency was, therefore, requested to, and did, submit a de-personalized list of all employees at NOS who were disciplined for theft or attempted theft of government property between January 1976 and January 1978, indicating the employee's position and grade, whether this was his or her first, second, third, etc. offense, and the nature of the disciplinary action taken.

The agency furnished documentation that two employees had been so disciplined during the period indicated. (Appellant's representative has submitted documentation of a third.). The first was an Ordnanceman, WG-7, who received a one-day suspension in June 1976, for attempted theft of government property, his first offense. Appellant's representative documents a letter of reprimand in July 1976 for "trace evidence of government gasoline in the tank of your vehicle."

The agency's table of penalties shows a range of reprimand to removal for an employee's first offense of actual or attempted theft of government property.

We find that a valid distinciton may be drawn between appellant's case and all three cased cited. In the

latter, the employees involved were station employees involved in ordnance work. Appellant, however, was a guard in the Security Department. The position decription for Guard states that the incumbent "must check...for fire, theft, illegal entry, misconduct, and must continually be alert for attempts at espionage or sabotoge." Thus, in the words of the deciding official, appellant "was observed violating the very regulation he was charged with enforcing." Therefore, we find that by virtue of the fact that appellant held a position of special trust and confidence, his situation was clearly distinguishable from the others cited, and the agency could properly hold him to a higher standard.

In view of the above, we find that the sustained charge supports the removal action taken by the agency.

CONCLUSION

After reviewing the entire record in appellant's case, we conclude that his removal for attempted theft of government property was not arbitrary or unreasonable, but was for such cause as would promote the efficiency of the service.

DECISION

The agency's removal of appellant from the position of Guard, GS-5, effective January 15, 1978, is hereby affirmed.

The decision of the appeals officer is final and there is no further right of appeal. This means that the decision of the appeals officer marks the exhaustion of those administrative

remedies which must precede resort to the courts. However, Section 772.310 of the Civil Service regulations permits the Commission's Appeals Review Board, in its discretion, and not withstanding the exhaustion of the right of appeal or the pendency of suit, to reopen and reconsider and previous decision of an appeals officer when the party requesting reopening submits writtten argument or evidence which tends to establish that:

(1) New material evidence is available that was not readily available when the decision of the appeals officer was issued;

(2) The previous decision of the appeals officer involves an erroneous interpretation of law or regulation, or a misapplication of established policy; or

(3) The decision of the appeals officer is of a precedential nature involving new or unreviewed policy considerations that may have effect beyond the case at hand.

If the agency has evidence or argument which it believes meets one or more of these criteria, it must submit that information and, where appropriate, evidence of temporary or conditional compliance with this decision, not later than 30 days after receipt of the decision.

If the appellant has evidence or argument which he believes meets one or more of these criteria, he must submit that information within a reasonable time after receipt of this decision.

Such request should be sent to:

Chairman

Appeals Review Board

U.S Civil Service Commission

Washington, D. C. 20415

For the Commission:

William M. Richman

Appeals Officer

APPENDIX C

DECISION OF MERIT SYSTEMS PROTECTION BOARD

OFFICE OF APPEALS REVIEW

June 22, 1979

June 22, 1979

Ms. Novella D. Taylor
President, Local 1160
American Federation of
Government Employees
P. O. Box 35
Indian Head, Maryland 206740

Dear Ms. Taylor:

This is in reference to your letter of August 18, 1978, requesting the Appeals Review Board (now Office of Appeals Review, Merit Systems Protection Board) to reopen and reconsider the July 27, 1978 decision of Washington, D. C. Field Office, Federal Employee Appeals Authority (now office of Appeals Operations, Merit Systems Protection Board), issued in the case of Mr. Charles L. Plater.

Sections 772.310 and 772.312 of Title 5, Code of Federal Regulation, set forth the regulatory criteria for reopening the previous decision of an

Appeals Officer. Under those sections, the party requesting reopening and reconsideration must submit writtten evidence or argument which tends to meet one or more of the regulatory criteria.

The Board has carefully reviewed your request, the Field Office decision, and the entire apellate record. Based on this review, the Board finds that your request does not meet any of the regulatory criteria of Secions 772.310 and 772.312 of the regulations. Therefore, the request to reopen the Field Office decision is denied, and that decision remains the final decision in this matter.

There is not further right of adminstrative appeal from a decision of the Merit Systems Protection Board on a request for reopening. This case is

considered to be closed in this office since all adminstrative appeal rights have been exhausted. Any further remedy available lies in the court system

For the Board:

Sincerely yours,

Cameron C. Smith, Acting Director

Office of Appeals Review

cc: Mr. Charles Plater

Star Route 1, Box 294A

Charlotte Hall, Maryland 20622

Mr. Charles Holman

Civilian Personnel Officer

Civilian Personnel Division

Naval Ordnance Station